

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA**

LYNN NELSON,	)	
	)	Case No.: 8:14-cv-00228-JFB-TDT
Plaintiff,	)	
	)	
v.	)	
	)	
BLUE CROSS AND BLUE SHIELD OF	)	<b>DEFENDANTS CONAGRA FOODS,</b>
NE; CONAGRA FOODS, INC; and	)	<b>INC. AND CONAGRA FOODS</b>
CONAGRA FOODS EMPLOYEE	)	<b>EMPLOYEE BENEFITS</b>
BENEFITS ADMINISTRATIVE	)	<b>ADMINISTRATIVE COMMITTEE’S</b>
COMMITTEE,	)	<b>MOTION FOR SUMMARY JUDGMENT</b>
	)	
Defendants.	)	

Defendants ConAgra Foods, Inc. (“ConAgra Foods”) and ConAgra Foods Employee Benefits Administrative Committee (the “EBAC”) (collectively, “the ConAgra Defendants”), pursuant to Federal Rule of Civil Procedure 56 and NECivR 7.1 and 56.1, respectfully move the Court for summary judgment as to Plaintiff Lynn Nelson’s (“Plaintiff”) Amended Complaint. In support of their motion, the ConAgra Defendants incorporate their brief in support of their motion for summary judgment and state as follows:

1. Plaintiff filed this action against the ConAgra Defendants and Blue Cross and Blue Shield of Nebraska (“BCBSNE”) to recover medical benefits Plaintiff alleges are owed to her under the Employee Retirement Income Security Act (“ERISA”).

2. Plaintiff’s claim for benefits relates to bariatric surgery that she underwent on or about April 18, 2012. At the time of her bariatric surgery, Plaintiff was a participant in the ConAgra Foods, Inc. Medical Plan (the “Medical Plan”), which is a component benefit of the ConAgra Foods, Inc. Welfare Benefit Wrap Plan (the “Wrap Plan”). Because bariatric surgery is not a covered benefit under the terms of the Medical Plan, Plaintiff’s claim for benefits was properly denied.

3. Had Plaintiff wished to appeal that decision, then she was required under the terms of the Medical Plan to exhaust her administrative remedies prior to filing a civil action by filing an appeal within 180 days of the date of the denial. It is undisputed that Plaintiff failed to pursue an appeal until more than two years later. Accordingly, Plaintiff's appeal for benefits was also properly denied as untimely.

4. Very simply put, the ConAgra Defendants are entitled to judgment as a matter of law because it was not an abuse of discretion to deny Plaintiff's untimely appeal for benefits. By waiting more than two years to pursue an appeal when the Medical Plan clearly requires that such appeals must be filed within 180 days of an adverse benefit determination, Plaintiff indisputably failed to exhaust her administrative remedies. As such, the denial of Plaintiff's appeal as untimely was not arbitrary or capricious and should be upheld.

5. Further, because Plaintiff's claim for benefits is barred by her failure to exhaust, a review of the initial benefit determination is not warranted. However, even assuming such decision could be reviewed, the initial denial also should be upheld because it was not an abuse of discretion to find that the bariatric services for which Plaintiff sought reimbursement were not covered by the Medical Plan.

6. Accordingly, Plaintiff's claim fails and summary judgment must be granted in the ConAgra Defendants' favor.

WHEREFORE, the ConAgra Defendants respectfully request that the Court grant summary judgment in their favor as to Plaintiff's Amended Complaint, award the ConAgra Defendants their attorneys' fees and costs incurred herein, and grant all other further relief the Court deems appropriate.

Respectfully submitted,

HUSCH BLACKWELL LLP

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ConAgra Foods Employee Benefits Administrative  
Committee*

**CERTIFICATE OF SERVICE**

The undersigned counsel hereby certifies that the foregoing was filed with the Court via the Court's CM/ECF System and thus served upon all parties of records this 1st day of May, 2015.

/s/ Brittany M. Falkowski